165-504

165-504

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~445~~. 164

THE UNITED STATES, APPELLANT,

vs.

HENRY G. McMILLAN, JOHN J. DALY, AND WORDEN P. NOBLE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 8, 1894.

(15676.)

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1 In the third district court, U h Territory.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
HENRY G. MCMILLAN, JOHN J. DALY, AND Worden P. Noble, defendants.

Now comes the plaintiff above named, and by its attorney for the district of Utah complains of the defendants above named, and alleges:

That heretofore, to wit, on or about the 8th day of June, A. D. 1889, the defendant Henry G. McMillan was duly appointed clerk of the third judicial district court of the Territory of Utah, by the presiding judge thereof, and thereafter, to wit, on the same day the said defendant, as principal, and the above-named John J. Daly and Worden P. Noble as sureties, by their writing obligatory, duly signed, sealed, and delivered, acknowledged themselves, their heirs, executors, and administrators to be jointly and severally held and firmly bound unto the said United States of America in the full sum of $10,000 in lawful money of the said United States, which said writing obligatory, nevertheless, was and is subject to certain conditions therein written, whereby among other things it was conditioned if the said Henry G. McMillan, as clerk of said court as aforesaid, should faithfully discharge by himself and his deputies the duties of his said office, and properly account for all monies coming into his
2 hands, as required by law, that the said obligation should be void; otherwise of force, as by the said writing obligatory and the condition thereof fully and at large appears.

That between the 8th day of June and the 31st day of December, A. D. 1883, inclusive, the said Henry G. McMillan, while clerk as aforesaid, and as such, earned, collected, and received from different sources as the fees and emoluments of his said office $7,458.70, of which sum $988.90 was earned and received in United States business; $3,776.00 for declarations of intention and naturalizations, and $2,693.80 from private persons in civil litigation and from the Territory of Utah on account of Territorial business.

That the said Henry G. McMillan was entitled to retain of the monies aforesaid, as his personal compensation during the period aforesaid, the sum of $1,984.93, and the further sum of $1,744.05 as the reasonable and necessary expenses of his said office during the period aforesaid, as allowed by the Attorney-General of the said United States.

That it was the duty of the said Henry G. McMillan as clerk aforesaid, on the 31st day of January, 1890, to account for and to pay over to the said United States and into the Treasury thereof all moneys so earned and received by him as aforesaid in excess of the sum of $3,728.98, his personal compensation and office expenses as aforesaid, to wit, the sum of $3,729.72.

That the said Henry G. McMillan utterly failed at the time aforesaid, and hitherto has neglected and failed to account for or to pay said sum or any part thereof, except the sum of $21.60, leaving a balance due the said United States of $3,708.12.

3 And for a further and second cause of action the said plaintiff complains and alleges:

That heretofore, to wit, on or about the 8th day of June, A. D. 1889, the defendant Henry G. McMillan was duly appointed clerk of the third judicial district court of the Territory of Utah, by the presiding judge thereof, and thereafter, to wit, on the same day, the said defendant, as principal, and the above-named John J. Daly and Worden P. Noble, as sureties, by the writing obligatory, duly signed, sealed, and delivered, acknowledged themselves, their heirs, executors, and administrators to be jointly and severally held and firmly bound unto the said United States of America in the full sum of $10,000 in lawful money of the said United States, which said writing obligatory, nevertheless, was and is subject to certain conditions therein written, whereby among other things it was conditioned if the said Henry G. McMillan, as clerk of said court as aforesaid, should faithfully discharge by himself and his deputies the duties of his said office, and properly account for all monies coming into his hands, as required by law, that the said obligation should be void; otherwise of force, as by the said writing obligatory and the conditions thereof fully and at large appears.

That between the first day of January and the 31st day of December, A. D. 1890, inclusive, the said Henry G. McMillan, while clerk as aforesaid, and as such, earned, collected, and received from different sources as the fees and emoluments of his said office $10,544.70, of which sum $1,793.35 was earned and received in United States business; $1,439.50 for declaration of intention and naturalizations, and $7,311.85 from private persons and civil litigation and from the Territory of Utah

4 on account of Territorial business.

That the said Henry G. McMillan was entitled to retain of the monies aforesaid, as his personal compensation during the period aforesaid, the sum of $3,500, and the further sum of $2,756.75 as the reasonable and necessary expenses of his said office during the period aforesaid, as allowed by the Attorney-General of the said United States.

That it was the duty of the said Henry G. McMillan as clerk aforesaid, on the 31st day of January, A. D. 1891, to account for and to pay over to the said United States and into the Treasury thereof all monies so earned and received by him as aforesaid in excess of the sum of $6,256.75, his personal compensation and office expenses as aforesaid, to-wit, the sum of $4,287.95.

That the said Henry G. McMillan utterly failed at the time aforesaid, and hitherto has neglected and failed to account for or to pay said sum or any part thereof, save the sum of $793.40, paid March 31st, 1892.

Wherefore the said United States demands judgment against the said defendants, and each of them, in the full sum of $7,996.07, with interest at the rate of six per cent per annum, and until paid, on $3,708.12 from January 31st, A. D. 1890, and like interest on the sum of $4,287.95 from January 31st, A. D. 1891, together with its costs for suit.

CHAS. S. VARIAN,
U. S. District Attorney.

(Endorsed:). # 11370. Title, court, and cause. Complaint. Filed December 31st, 1892. Henry G. McMillan, clerk. District attorney.

5 Title, court, and cau'e.

Now come the defendants above named and demur to the complaint of plaintiff on file herein, and for cause of demurrer show to the court:

First. That said complaint does not state facts sufficient to constitute a cause of action.

Second. That the cause of action attempted to be stated in the first count in said complaint does not state facts sufficient to constitute a cause of action.

Third. That the cause of action attempted to be stated in the second count of said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray to be hence dismissed with their costs.

W. H. DICKSON, RAWLINS & CRITCHLOW, and
JAMES N. KIMBALL,
Attorneys for said Defendants.

(Endorsed:) # 11370. Title, court, and cause. Demurrer. Service by copy admitted this 8th day of March, 1893. C. S. Varian per L. T., atty. for plff. Filed March 8th, 1893. Henry G. McMillan, clerk. W. H. Dickson, Rawlins & Critchlow, and J. N. Kimball, for defts.

6 Title, court, and cause.

The demurrer to the complaint herein is now argued by W. H. Dickson for defendants, and by J. W. Judd, U. S. attorney; and the same being submitted, is taken under advisement.

Dated September 29th, A. D. 1893.

7 Title, court, and cause.

The demurrer of the defendants to the complaint herein having been heretofore argued and submitted to the court, and the court having considered the question raised by the demurrer, and having made and filed its written opinion herein, it is accordingly ordered that said demurrer be, and the same is hereby, sustained, and John W. Judd, U. S. attorney, being present and stating to the court that he can not amend the complaint, on motion of W. H. Dickson, of counsel for defendants,

It is ordered, adjudged, and decreed that the complaint herein be and the same is hereby dismissed, and that plaintiff take nothing by its said suit, and that the defendants have and recover their costs herein.

To all of which ruling and order the plaintiff excepts.

Dated October 12th, A. D. 1893.

(Endorsed:) #11370. Title, cause. Judgment. Filed October 12, 1893. Henry G. McMillan, clerk.

8 Title, court, and cause.

This is an action brought by the United States against Henry G. McMillan and his sureties on his bond as clerk of the third district court, for certain fees which the plaintiff claims should have been included in his half-yearly returns. The plaintiff alleges in the first count of its complaint that the clerk received these fees as emoluments of his office from

the 8th day of June to the 31st day of December, 1889 (and makes the same allegations in the second count except as to amount and time). The complaint charges that between these dates "the said Henry G. McMillan, while clerk as aforesaid, and as such, earned, collected, and received from different sources as the fees and emoluments of his said office, $7,458.70, of which sum $988.90 was earned and received in United States business, $3,776 for declarations of intention and naturalization, and $2,693.80 from private persons in civil litigation, and from the Territory of Utah on account of Territorial business."

The point for decision arises on the demurrer to this complaint on the ground that neither of the counts states facts sufficient to substitute a cause of action.

The question is as to whether the defendant clerk is compelled under the law of the United States to make returns of Territorial emoluments which are received from Territorial business and from naturalization.

The plaintiff claims that the clerk is required to make returns of all fees and emoluments, whether arising out of United States or
9 Territorial business, and the defendants deny that he is required so to do under the statute. This requires a construction of certain sections of the act relating to fees for clerks and other officers as to whether they apply to Territorial business.

The act to regulate fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States was passed February 26th, 1853, and provides "That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, the following and no other compensation shall be taxed and allowed." And then followed a specification of fees to be allowed in the conduct of the business.

In this act the Territories were not included, and its provisions did not apply to clerks of Territorial courts, but only to clerks of the circuit and district courts of the several States of the United States. There is no allusion whatever in any of its provisions to Territorial civil or Territorial criminal business, nor is there any reference to naturalization of aliens. The act was passed to regulate the fees for United States business in the several States, and there can be no question that (no reference whatever having been made to the Territories or officers of the Territories) at the time of its passage it was not intended to apply to the Territories.

The law so continued without reference to the Territories, until March 3rd, 1855, when it was enacted "that the provisions of the act of
10 February twenty-sixth, eighteen hundred and fifty-three, 'to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes,' are hereby extended to the Territories of Minnesota, New Mexico, and Utah, as fully in all particulars as they would be had the word 'Territories,' been inserted in the sixth line after the word 'States,' and the same had read 'in the several States and in the Territories of the United States.' This clause to take effect from and after the date of said act, and the accounting officers will settle the accounts within its purview accordingly."

It clearly appears that up to this time the clerk of the Territorial courts were not required to report the fees in question.

The Supreme Court of the United States, in the case of United States vs. Hill, 120 U. S., 169, expressly held that the act did not apply to naturalization cases, and that the clerks need not make returns of their fees received in that class of cases. This was for the district of Massachusetts, and the same ruling would also apply to the Territories of the United States.

The section upon which counsel for plaintiff relies, or that part of it which is in point here, provides that the clerk shall "at the time of making his half-yearly return to the Attorney-General, pay into the Treasury or deposit to the credit of the Treasurer, as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him." This section would be broad enough to include all fees of the clerk if the law just referred
11 to applied to Territorial business and naturalization.

Counsel for plaintiff claims that there is a conflict between the case of The United States vs. Hill, and the case of The United States vs. Averill, which is found in 130 U. S., 335. I have examined the original papers in the latter case, and as appears therefrom, that was an action brought against Clerk Averill for fees which were due the United States from United States business. There is no reference whatever in the complaint to Territorial fees or to naturalization fees, and aside from the ruling in that case it is certainly very clear, in view of the pleadings, that the clerk must account for such fees. After examining the two decisions (which were written by the same justice) I can see no conflict. In the former case the question was raised as to naturalization fees, which were not included in the fee bill of the United States, and the court there held that the law did not apply in that class of cases. In the latter case there is no mention made either of Territorial business or of naturalization. Territorial business is not referred to in the statute providing the fees for the United States business, and I think the same ruling would apply as in cases of naturalization, and there being no reference whatever in the fee bill either to Territorial criminal or Territorial civil business, nor to naturalization, I think the case of The United States vs. Hill should control and does control in this case.

In United States vs. Averill the complaint made no reference to the classes of fees. In question in the present case they are distinctly
12 set out, both for Territorial business and for naturalization, and in this respect this case is similar to that of United States vs. Hill.

There is further reason for this view. It would seem impossible to conceive what interest the United States can have in business which is purely Territorial. The United States is not affected thereby.

If there is any equity it will be in favor of the parties who were compelled to pay these fees. If the clerk (but it does not appear so in this case) retained fees for Territorial business to which he had no right, or has charged fees to which he was not entitled to under the law, then in equity the return should be made to the parties from whom those fees were collected. Clearly, the United States can have no equitable interest in Territorial business. It has no more interest in this class of business than it would

have in naturalization cases, and this holds true as to Territorial or criminal business as well as to Territorial civil business. I think the demurrer should be sustained.

Mr. JUDD. I desire to enter an exception to the action of the court. I do not know what course the Attorney-General at Washington may desire me to take. I shall communicate with him, and if he desires it I shall make an appeal.

Mr. DICKSON. If your Honor please, I understand that it is not possible to make any amendment to the complaint, and therefore we ask judgment of dismissal, so that if they desire to appeal the case will be in such shape that they can do so. I ask that the complaint be dismissed.

The COURT. It may be so ordered.

13 Mr. JUDD. I desire to enter an exception to the action of the court in dismissing the complaint.

Dated October 12, 1893.

(Endorsed:) Title, cause. Opinion. Filed October 12, 1893. Henry G. McMillan, clerk.

14 Title, court, and cause.

Notice of appeal.

To WM. H. DICKSON,
Attorney for Defendants, and to
D. C. DUNBAR,
Clerk of said Court:

Take notice, that the plaintiff in the above-entitled action hereby appeals to the supreme court of said Territory from the judgment therein rendered and entered on the 12th day of October, 1893, in favor of the said defendants and against the said plaintiff, dismissing the said plaintiff's complaint, and from the whole thereof, this the 13th day of March, A. D. 1894.

JOHN W. JUDD,
Attorney for Plaintiff and U. S. Attorney for Utah.

(Endorsed:) # 11370. Service of copy admitted March 13th, 1894. W. H. Dickson, atty. for defts. Filed March 13th, 1894. David C. Dunbar, clerk. By Geo. D. Loomis, clerk.

15 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, Davis C. Dunbar, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint, demurrer, minute-book entry taking demurrer under advisement, order sustaining demurrer and judgment thereon, opinion of the court, and notice of appeal in the action therein entitled filed in my office.

Witness my hand and the seal of said court at Salt Lake City, this 24th day of March, A. D. 1894.

DAVID C. DUNBAR, *Clerk.*
By GEO. D. LOOMIS, *Deputy Clerk.*

16 Title, court, and cause.

Assignment of errors.

Comes the plaintiff, the United States, and assigns error upon the action of the court in the above-entitled case, in this:

That the court erred in sustaining the demurrer of the defendant and in dismissing the plaintiff's complaint.

JOHN W. JUDD,
Atty. for the Plaintiff.

17 In the supreme court of Utah Territory. Regular June term, 1894. Monday, June 11th.

THE UNITED STATES, APPELLANT,
vs.
H. G. MCMILLAN ET AL. } Appeal from 3rd district.

This cause, coming on regularly for hearing, was argued by Andrew Howat, esq., in behalf of appellants; by W. H. Dickson, esq., in reply; was submitted and taken under advisement.

18 In the supreme court of Utah Territory. Regular June term, 1894. Monday, June 18.

THE UNITED STATES, APPELLANT,
vs.
HENRY G. MCMILLAN ET AL.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed, with costs.

Thereupon the Hon. Attorney-General of the United States, by Hon. John W. Judd, district attorney for Utah, prays the allowance of an appeal to the Supreme Court of the United States, and it was ordered that such appeal as prayed for be, and is hereby, allowed.

19 In the supreme court of Utah Territory.

UNITED STATES OF AMERICA, APPELLANT,
vs.
HENRY G. MCMILLAN, JOHN J .DALY, AND
Worden P. Noble, respondents.

MERRITT, C. J.:

This is an action brought by the United States against Henry G. McMillan, late clerk of the third district court of Utah Territory, and his bondsmen, to recover an alleged surplus of fees and emoluments alleged to have been earned and received by said McMillan as such clerk, and which it is alleged he failed to account for and pay over as required by secs. 833 and 844 of the U. S. Revised Statutes.

The complaint contains two counts. The first alleges that between the 8th day of June and the 31st day of December, 1888, the said McMillan, as such clerk, earned and received as fees and emoluments of his said office $7,458.70, of which sum $988.90 was earned and received in United States cases, $3,776.00 for declarations of intention and naturalizations, and $2,693.80 from private persons in civil litigation and from the Territory on account of Territorial business. It is further alleged that the said McMillan was entitled to retain of said moneys as his personal compensation and reasonable and necessary expenses of his office the sum of $3,728.98, an' no more, and that it was his duty to account for and pay into the Treasury of the United States all moneys received by him
20 in excess of said last-mentioned sum, to wit, $3,729.72; that he has faioed to account for or pay any part thereof except the sum of $2,160.00, leaving a balance due the United States as alleged of $3,708.12.

The second count alleges that between the first day of January and the thirty-first day of December, 1890, the said McMillan, as such clerk, earned and received as fees and emoluments of his said office the sum of $10,544.70, of which sum $1,793.35 was earned and received in United States cases, $1,439.50 for declarations of intention and naturalizations, and $7,311.85 from private persons in civil litigations and from the Territory on account of Territorial business. It is further alleged that the said McMillan was entitled to retain of said moneys as and for his personal compensation and as reasonable and necessary expenses of his said office $6.256.75, and no more; and that it was his duty to account for and pay into the Treasury of the United States all moneys received by him as aforesaid in excess of said sum of $6,256.75, to wit, the sum of $4,287.95, and that he has failed to account for or pay any part of said sum except the sum of $793.40, and a judgment is prayed against the said clerk and his bondsmen accordingly.

To this complaint and to each count thereof the defendants demurred on the ground that the facts stated were insufficient to constitute a cause of action. The demurrer was sustained by the court below, and th' plaintiff declining to amend, judgment was entered in favor of the defendants, dismissing the bill of the complainany, from which ju'gment this appeal was prosecuted by the Government.

Two questions are presented: First. Is the clerk required to account for, as fees and emoluments of his office, moneys earned and
21 received by him in civil cases between private parties and from the Territory in Territorial business?

Second. Is he required to account for, as such fees and emoluments, moneys earned and received by him in the matter of the naturalization of aliens? We think both of these questions are to be answered in the negative.

The legislature of the Territory of Utah, by an act approved February 20th, 1874, prescribed the fees and compensation of clerks of the district courts. (This act is still in force, and will be found in Com. Laws, 1888, vol. 2, pages 804 et seq.)

This act has received the implied sanction of Congress (Clinton vs. Englebrecht, 13 Wall., 434, 446), and we take judicial notice that the practice of the courts of this Territory has been to tax the costs of the

clerks, marshals, etc., in accordance with the Territorial fee bill, in all other than United States business. It in many instances prescribes for the clerk la'ger compensation than does the Federal fee bill for precisely similar services, and also gives and allowance for some services for which no corresponding charge is found in the act of Congress. The Federal fee bill (U. S. Rev. Stat., sec. 823 et seq.) p'ovides that n' other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, etc., than that therein provided for. Now, if this act is ap'licable to civil cases between private parties and to Territorial, civil, and criminal busines', then all moneys received and collected by the clerk in such cases, in conformity with the Territorial fee bill and in
22 excess of what could have been allowed to him, if his compensation were taxed under the Federal fee bill, were illegally exacted, and the Territory or the individual from whom they were so illegally exacted, and not the United States, should be entitled to sue for and recover the same.

In the case of Marte vs. Ogden City Ry. Co., decided at the last January term and reported in the 35th Pac. Rep., 501, we hold that the Federal fee bill was not applicable to cases in the Territorial courts in which the United States was not a party, or of which the Federal courts would not have exclusive jurisdiction if the Territory were a State; and that officers, jurors, and witnesses, when discharging duties and services under United States laws, should be compensated according to the Federal fee bill, and when discharging duties or services under the Territorial laws they should be compensated according to the Territorial fee bill. We adhere to the ruling in that case, and we hold that the clerk was not required to account for any moneys earned or received by him in other than United States cases.

We also hold, upon the authority of the United States vs. Hill (120 U. S.), that he is not required to account for moneys earned or received in the matter of naturalizations.

The questions here presented were not involved in the case of United States vs. Averill (130 U. S., 335), relied upon by appellant. An examination of the record in that case discloses that the complaint therein charged simply that the clerk, Averill, had received and earned as fees and emoluments of his office a certain sum in excess of what he was entitled to retain for his personal compensation and the reasonable and
23 necessary expense of his office, and that he had failed to*na* account for the same. For aught that appears, all the moneys earned and received by the clerk in that case were earned and received as his fees and emoluments in United States cases.

The judgment of the lower court is affirmed.

We concur.

MINER, *J.*
SMITH, *J.*

(Endorsed:) # 484. Title, court, and cause. Opinion of the court. Filed, Jun' 18, 1894. Jos. P. Bache, clerk supreme court Utah.

18574——2

24 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, APPELLANT,
vs.
HENRY G. MCMILLAN, JOHN J. DALY, AND Worden P. Noble, respondents.

Comes now the appellant, by its attorney, John W. Judd, and assigns the following errors upon the ruling and decision of the supreme court of the Territory of Utah in the above-entitled cause:

First. Said court erred in affirming the judgment of the third district court therein rendered in said cause.

Second. Said court erred in failing to reverse the judgment of the third district court in said cause.

Wherefore, the United States prays that it be allowed and appealed to the Supreme Court of the United States, at Washington.

JOHN W. JUDD,
Attorney for Plaintiff.

(Indorsed:) Filed June 18, 1894. Jos. P. Bache, clerk.

25 United States of America.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of an appeal allowed in the case of the United States of America, plaintiff and appellant, vs. Henry G. McMillan et al., defendants and respondents, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, assignment of errors, and order allowing appeal, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record and proceedings, opinion, assignment of errors, and order allowing appeal, are full, true, and complete copies of the several originals thereof on file or of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of Utah Territory this 29th day of August, A. D. 1894, at Salt Lake City, Utah.

[SEAL.]

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

(Indorsement on cover:) Case No. 15676. Term No. 445. The United States, appellant, vs. Henry G. McMillan, John J. Daly, and Worden P. Noble. Utah Territory supreme court. Filed September 8th, 1894.

165-504 (1014)

165-504

Office Supreme Court, U. S.
FILED.
JAN 14 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
HENRY G. McMILLAN, JOHN J. DALY, and Worden P. Noble. } No. 164.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

APPELLANT'S BRIEF.

JOSHUA ERIC DODGE,
Assistant Attorney-General.
CHARLES C. BINNEY,
Assistant Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
HENRY G. MCMILLAN, JOHN J. DALY, and Worden P. Noble. } No. 164.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This case is an appeal from the judgment of the late supreme court of Utah Territory affirming the judgment of the third district court of that Territory sustaining a demurrer to a complaint filed by the United States, which complaint set up the following matters:

On June 8, 1889, Henry G. McMillan, having been appointed clerk of the third judicial district court of the Territory of Utah, executed a bond to the United States

in the sum of $10,000, with John J. Daly and Worden P. Noble as sureties, conditioned for the faithful discharge of the duties of his office as clerk and for the accounting for all moneys coming into his hands, as required by law. Between June 8, 1889, and December 31, 1890, the said McMillan, while acting as district court clerk, received $18,003.40 as official fees and emoluments, viz, $2,782.25 earned in United States business, $5,215.50 received for declarations of intention and naturalizations, and $10,004.65 received from private persons in civil litigation and from the Territory of Utah on account of territorial business. The said McMillan was entitled to retain out of the above total sum the sum of $5,484.93 for his salary, at $3,500 a year, and $4,500.80 for necessary office expenses, and should have paid over to the United States all moneys received in excess thereof, viz, the sum of $8,017.67, of which sum $3,729.72 should have been paid January 31, 1890, and $4,287.95 on January 31, 1891, but in point of fact he had only paid over the sums of $21.60 and $793.40, respectively, the latter having been paid March 31, 1892, leaving due the sums of $3,708.12, with 6 per cent interest thereon from January 31, 1890, and $4,287.95, with 6 per cent interest thereon from January 31, 1891. The two counts of the complaint related to the transactions of the years 1889 and 1890, respectively, the total of which transactions is given in the above statement. On October 12, 1893, the district court gave judgment sustaining the demurrer and dismissing the complaint, whereupon the plaintiff appealed to the supreme court of the Territory,

which court, on June 18, 1894, affirmed the judgment, whereupon the United States took the present appeal. (Rec. 1–7.)

ASSIGNMENTS OF ERROR.

First. The supreme court of the Territory of Utah erred in affirming the judgment of the third district court therein rendered in said cause.

Second. Said court erred in failing to reverse the judgment of the third district court in said cause. (Rec., p. 10.)

BRIEF OF ARGUMENT.

Two questions arise in this case, viz: First, whether the decision of this court in *United States* v. *Averill* (130 U. S., 335), viz, that under sections 823 and 839 of the Revised Statutes the clerk of a district court in Utah Territory was not entitled to more than $3,500 over and above his office expenses, applies to fees received by him from private parties in civil litigation and from the Territory in territorial business; and, second, whether the said decision applies to fees received for services in relation to declarations of intention and naturalizations.

I.

As to the first question, the facts in this case seem to involve a curious disregard of Federal statutes on the part of Federal judges and court officers and territorial authorities. By the *Act of March 3, 1855*, section 12 (10 Stats., 671), the *Act of February 26, 1853* (10 Stats., 161), "to

regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States," etc., was extended to Minnesota, New Mexico, and Utah Territories, but in spite of this fact the Territorial legislature, in the *Act of January 21, 1859* (Laws of Utah, 1851–1870, p. 71), adopted a fee bill for the officers of the district and supreme courts, differing from the fee bill established by the Federal act of 1853. Revised Statutes, Section 823, expressly declared that the Federal fee bill applied to attorneys, clerks of the circuit and district courts, etc., in the several States and Territories, while in section 1883 the following language was used:

> The fees and costs to be allowed the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses, commissioners, and printers, in the Territories of the United States shall be the same for similar services by such persons, as prescribed in chapter sixteen: Title "THE JUDICIARY," and no other compensation shall be taxed or allowed.

As if sections 823 and 1883 were not clear enough, the *Act of June 23, 1874* (18 Stats., 253), declared that the act of 1853 "is extended over and shall apply to the fees of like officers in said Territory of Utah." Notwithstanding these repeated declarations of Congress, however, the Territorial legislature, which had adopted a new fee bill by the act of February 20, 1874, retained the same in the official compilation of Territorial laws, published in 1888 (2 Compiled Laws of Utah, 1888, p. 805), and it is clear from the opinion of the court

below that this Territorial fee bill, and not the United States fee bill, was always adhered to in all cases except those involving "United States business." When, therefore, the district and supreme courts of Utah declared, in *United States* v. *Averill* (4 Ut., 416), that the compensation of a clerk of a district court in that Territory was not limited by Revised Statutes, section 839, their decision was only consistent with the settled disregard of Federal law that had prevailed in the Territory in regard to such matters as this ever since 1855.

In *United States* v. *Averill* (130 U. S., 335), however, this court upheld the Federal law, and the present case arises from an attempt to refine away that decision by excluding from its application all fees but those derived from what is called "United States business," although the following language used by this court would seem to admit of no refining away.

> The fees mentioned in section 1883 as "to be allowed" to clerks of the district courts in the Territories cover the fees to be retained by them for compensation for services. Sections 823 and 839 are in chapter 16 of the title mentioned. They prescribe the fees to be allowed to and retained by clerks of district courts, "and no other compensation" can, under section 1883, be allowed to be retained by clerks of the district courts in Utah for personal compensation than is by the provisions of chapter 16 of the title mentioned prescribed to be allowed to be retained by the clerks of the district courts named in section 839 for personal compensation. (130 U. S., pp. 340–341.)

In point of fact, this court ought not to have been called upon as late as 1879 to define its position in regard

to these fees. In *United States* v. *Hill* (120 U. S., 169, 179), decided in 1877, this court had quoted with approval the opinion of the circuit court for Massachusetts, which adopted the language of Attorney-General Devens in regard to the "fees and emoluments" of a district court clerk, for which, under Revised Statutes, section 833, he must account, as follows:

> "This language embraces every possible fee or emolument accruing to you by reason of your official capacity, and does not allow the withholding of any. Whatever is done by you that you could not do if out of office has an official color and significance that brings it within the compass of the language of the statute." This is undoubtedly a forcible and accurate statement of the meaning of the statute.

In spite of the very positive and comprehensive language used by this court, the court below held in *Marte* v. *Railway Company* (9 Ut., 459), that the Federal fee bill only applied to services performed under the Federal laws, while as to services rendered in the administration of the Territorial law the Territorial fee bill applied. The theory of this proposition appears to be that when a clerk of a district court in a Territory acts in suits brought under the Territorial law he is not acting as a clerk of a United States district court, and upon that theory it was but natural for the court below to go one step beyond its position in *Marte* v. *Railway Company*, and to hold, in the present case, that under sections 839 and 844 a clerk of a district court in a Territory was not required to account for any fees but those received by him for services performed in proceedings under the

Federal laws. It is submitted that both the theory and the conclusions therefrom are erroneous.

In *Pitts* v. *Logan County* (41 Pac. Rep., 584), the supreme court of Oklahoma Territory has placed itself on the side of the Federal law and in direct opposition to the court below; Scott, J., saying as follows:

> There can be no doubt that the Territorial legislature has no right to interfere with the compensation of the clerks in the district courts. The clerk must account for all of his fees, and if so, Congress is the only authority to fix the amount of such fees.
>
> * * * * *
>
> Congress created this court as one court, having general jurisdiction in all United States and Territorial matters. The clerk was created as the clerk of that court. He is not the clerk of two courts, or three courts, or any other number, but that one. He is accountable only to the United States for his actions, and the Territory can have no jurisdiction over him whatever. Taking this view of the question, it must necessarily follow that the legislative assembly has no power to establish and regulate the fees and compensation of clerks of Territorial courts established by the laws of Congress, and the provisions of this character involved in this controversy are in conflict with the organic act and the statutes of the United States governing the fees of the clerks, and are therefore void, and in no sense a rightful subject of legislation.

The organic act of Oklahoma Territory (26 Stats., 81), referred to in the above quotation, provided for the establishment of district courts and the appointment and fees of their clerks in accordance with the general system as

set out in the Revised Statutes, so that there can be no doubt that the words above quoted applied with equal force to the district court clerks in the late Territory of Utah as to those in Oklahoma, and it is submitted that the reasons given by the Oklahoma court, and the authorities cited by it, amply sustain its position.

In 1854 Attorney-General Cushing held that the clerk of the circuit court of the District of Columbia, being also clerk of the criminal court, was required to account to the Treasury for his fees in both capacities, the criminal court being merely "an exfoliation" of the circuit court, and its expenses being paid under acts appropriating for the expenses of circuit courts. (6 Op. A. G., 388.)

In 1855 Mr. Cushing also held that the clerk of the courts of the District of Columbia must account for fees received in private litigation, as well as those received in suits to which the United States was a party, his official capacity being precisely the same in both classes of cases. Again, in 1856, he held that this clerk must make a return of all fees charged in private litigation, even though they had not yet been actually received. (7 Op. A. G., 610; 8 id. 33.) All these opinions were approved and followed by Attorney-General Black in 1858. (9 Op. A. G., 136.)

The position taken by the Attorney-General in the first of these opinions goes even further than would be required in the present case. He there held that where a separate court had been created, to which the criminal jurisdiction formerly possessed by the circuit court had been transferred, but for which there was no separate clerk, the circuit court clerk had to account for all his fees received in

both courts, though the statute said nothing about a clerk of a criminal court; whereas here there was but one court, though having jurisdiction of suits brought under two bodies of laws, the Federal and the Territorial. If a clerk of two courts be required to account for fees received in both courts, though the statute makes express mention of but one, certainly a clerk of one court having, so to speak, two sides, must, under a similar statute, be required to account for all his fees received on both sides of the court.

It has long been settled that courts established by Congress in the Territories are not "courts of the United States," i. e., courts established under the article of the Constitution relating to the judicial power (*Clinton* v. *Englebrecht*, 13 Wall., 434, and cases there cited), but it is no less certain that they are courts established by Congress, and that the authority of the Territorial legislature over them is merely such as Congress sees fit to grant, so that, in a modified sense they may even be spoken of as courts of the United States in contradistinction to State courts. (*Hunt* v. *Palao*, 4 How. (U. S.), 589; *United States* v. *Haskins*, 3 Saw., 262.) Congress has left the matter of the summoning of juries in these courts entirely to the control of the Territorial legislature (*Clinton* v. *Englebrecht*, *supra*), but, on the other hand, the chancery jurisdiction of these courts is wholly outside of that control (*Orchard* v. *Hughes*, 1 Wall., 73), while even the control of the summoning of juries, as of every other matter which has been left to the Territorial legislature, could be assumed by Congress at any time. (*Reynolds* v. *United States*, 98 U. S., 145, 154.) So in the matter

of the fees of clerks and other court officers, up to March 3, 1855, Congress left this to the Territorial legislature to regulate, but on that day Congress took the matter under its own control, and has so retained it ever since. If, as the statements in the opinion of the court below indicate, the acts of Congress as to this matter have not been obeyed, that is the affair of the executive branch of the Government, and can not impair the legal force of the acts themselves. The court below asserts, indeed, that the Utah Territorial fee bills have received the implied sanction of Congress. *Clinton* v. *Englebrecht* (*supra*) is cited in support of this assertion, but it is submitted that the citation is not warranted. It was there stated that as every Territory had passed laws regulating the summoning of juries, and none of these laws had ever been disapproved by Congress, this was an indication that Congress approved them; but in the present case Congress has had the last word in the matter, both in the Revised Statutes, section 1883, and in the act of June 23, 1874, the latter act declaring that the Territorial act of March 3, 1852, "and *all* laws of said Territory inconsistent with the provisions of this act *are hereby disapproved*," and that the act of 1853 in regard to the fees and costs of clerks, marshals, and attorneys of circuit and district courts "is extended over and shall apply to the fees of like officers in said Territory of Utah." As the latest Territorial fee bill was enacted four months before, viz, February 20, 1874, it certainly came within the words "all laws of said Territory inconsistent with the provisions of this act," and received the disapproval

of Congress. The mere fact that this disapproval remained unheeded in the Territory can not be regarded as a revocation of it.

The First Comptroller held in 1882 that although the district attorney of Utah had certain Territorial duties not required of any other district attorney in a Territory, and was paid therefor out of the Territorial treasury, this did not increase his maximum salary, his compensation not being "determined by the anomaly as to his duties, but by the statutes, and these are sufficiently plain." (3 Lawrence's Decisions, 119.) Certainly the statute establishing a maximum compensation for district attorneys is no plainer than the similar statute as to district court clerks. That Congress should regulate the clerk's fees in territorial courts, and should require them to be accounted for, is in entire accord with the system pursued in regard to such courts. As appears from the annual appropriation acts, and as the court is well aware, Territorial courts are maintained at the cost of the United States. It is entirely consistent that the government which maintains a court should regulate the fees to be paid therein, and should require the officers who receive those fees to account for them, and to retain only so much as will cover a certain maximum salary and necessary office expenses. If this were not done in Territorial courts they would constitute an exception to the general rule in regard to courts maintained by the United States. The truth in regard to these fees is, they are not paid to the clerk as an individual, but as a representative of the court and of the government which maintains the court. The clerk is a collecting agent of the Government (7.

Op. A. G., 610), and therefore it makes no difference to whom the services for which the fees are charged are rendered, whether to the United States, the Territorial government, or private individuals.

In the opinion of the court below it is stated that the Territorial fee bill is, as to certain services, higher than the Federal fee bill, and that if the fees prescribed by the former were illegally charged for services in suits brought under the Territorial law, then "the Territory or the individual from whom they were so illegally exacted, and not the United States, should be entitled to sue for and recover the same." (Rec., p. 9.) This view is wholly unsupported by authority. It has been held that where excessive fees to a district attorney were illegally taxed as costs and were paid by defendants, he could not retain them, but must account for them to the Government just as if they were legal charges. (*Bliss* v. *United States*, 37 Fed. Rep., 191; 38 *Id.*, 230.) This rule must obviously be the same as to excessive clerk's fees, and his accounting for them can not possibly affect any rights which the parties who have paid them may have to recover them back as illegal exactions.

Did the decision of the court below rest upon any doubtful language in a statute, or upon any authority, no matter how slight, it might be differently regarded; but the plain words of the statute and of this court, the decision of another Territorial court, and the opinions of attorneys-general and comptrollers in closely analogous cases being all against it, that decision appears to rest upon nothing but the same disregard of the Federal law as was shown in *United States* v. *Averill*.

II.

In holding that the appellee McMillan was not required to account for fees received for declarations of intention and naturalizations, the court below considered that it was following the authority of *United States* v. *Hill* (120 U. S., 169). In that case this court held that it having been the custom since 1839 in the United States courts in Massachusetts, known and approved by the judges, for the clerk to charge $3 in naturalization proceedings without accounting for such fees, his services being regarded by the judges as of such a character as they could have required a special officer to perform, and not such as necessarily belonged to the office of clerk; therefore the appellee in that case should not be required to account for such fees. The court below assumed that the decision in *United States* v. *Hill* applied to all fees received in naturalization proceedings in all Federal courts, but it is submitted that the decision is not in itself applicable to any courts except where the same practice is shown to prevail as was shown to prevail in Massachusetts, and that no such practice is shown to have prevailed in Utah.

In the present case it does not appear what the particular services were for which the appellee McMillan received fees, but each count of the complaint alleges:

> That between * * * and * * * inclusive, the said Henry G. McMillan, while clerk as aforesaid, and *as such*, earned, collected, and received from different sources *as the fees and emoluments of his said office*, * * * of which sum * * * was earned and received * * * for declarations of intention and naturalizations. (Rec., p. 1.)

This is a clear allegation that the fees earned and received for declarations of intention and naturalizations were fees and emoluments of the clerk's office, and received by him as clerk. The demurrer having admitted this fact, it must, upon the present record, be taken to be true, unless it be held that the fact be insufficiently pleaded, or involve a false assumption of law.

The word "for" is used in many senses, and includes "in relation to," "with respect or regard to." (Century Dictionary.) The language of the complaint may therefore be construed as stating that the appellee McMillan, while clerk of the third district court in Utah Territory, and as such, earned, collected, and received the amounts stated as the fees and emoluments of his said office, for services rendered by him in relation to declarations of intention and naturalizations. It is submitted that the receipt of these fees by the appellee McMillan for services rendered by him as clerk in relation to declarations of intention and naturalizations is sufficiently pleaded, and that therefore the demurrer should have been overruled as to this point, unless it be untrue, as matter of law, that a district court clerk can, as such, receive any fees for services rendered in relation to declarations of intention and naturalizations.

Revised Statutes, section 2165, as amended by the *Act of February 1, 1876* (19 Stats., 2), requires every declaration of intention to be made before the court or the clerk of the court "on oath," which oath is, of course, to be administered by the clerk, even when the declaration is made before the court. The same section requires

the applicant for naturalization to take an oath of allegiance and renunciation, and to make certain facts (viz, his residence, his behavior as a man of good moral character, his attachment to the principles of the Constitution, and his being well disposed to the good order and happiness of the United States) appear to the satisfaction of the court. These facts, it is well known, are usually proved in each case by the testimony, on oath, of one or more persons. The clerk is, of course, the proper person to administer these oaths, and the statute expressly requires that all the proceedings be recorded by him. The fee bill allows him 10 cents for each oath and 15 cents a folio for making a record. Besides this, whatever papers are sealed with the court's seal, or filed, or whatever certificates are issued in naturalization proceedings, such sealing, filing, or issuing must be done by the clerk; and for all such services the fee bill allows and requires charges to be made and collected by him as clerk. Certainly these services are such as could not be rendered by the clerk if out of office, and hence must come within Attorney-General Devens's statement of the meaning of the statute, approved by this court in *United States* v. *Hill* (*supra*). Moreover, as the statute forbids naturalization by any State court other than a court of record, "having common law jurisdiction and a seal and *clerk*," it would be remarkable if the clerk had no duties, as clerk, in naturalization proceedings.

In *United States* v. *Hill* (*supra*) this court rested its decision expressly on the ground that, it being doubtful whether or not the charges of $1 for declarations of

intention and $2 for naturalizations, which the judges in Massachusetts allowed the clerks to make, came within the description "the fees and emoluments *of his office* of every name and character," in section 833, Revised Statutes; and these charges having for nearly fifty years been regarded by the judges in Massachusetts as not being fees of the clerk's office, it must have been understood when the clerk and his sureties executed his official bond that he would not be called upon to account for these charges. The court said (120 U. S., 182):

> The surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond, and the semiannual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction.

Had not the charges made by the clerk in Massachusetts been expressly authorized by the judge, not merely would the former and his surety have been entitled to no special consideration, but the charges would probably have been regarded as extortion, on the doctrine of *United States* v. *Waitz* (3 Saw., 473). In the present case neither the equities to which the court alluded in the Hill Case, nor the doubt as to the meaning of the statute, are found. As already stated, no such practice as prevailed in Massachusetts is shown to have prevailed in Utah, and

hence no recognized interpretation of the statute in the appellees' favor appears to have existed in Utah when they executed the bond. All that appears is that the appellee McMillan received certain fees *as clerk*, which fact necessarily raises the presumption that these fees were for such services as could only be done by him as clerk, viz: administering oaths, making records, filing papers, affixing the seal of the court, issuing certificates, and possibly other services, all covered by the fee bill, and for which only the legal charges were made, and excluded such as in the *Hill* case "might have been performed by any special officer." From the report of the *Hill* case it does not appear with certainty whether the charges made by the clerk in Massachusetts included the administration of oaths, making of records, etc., or covered merely the extra clerical services which the court had, for its own convenience, required him to perform. It is to be inferred, however, that the former condition existed, because on December 21, 1891, the circuit court for Massachusetts modified its rules by an order establishing a "table of fees to be charged by the clerk of this court in naturalization cases, and to be accounted for in his emolument returns," and also a schedule of other charges for his nonofficial services in such cases, which order we understand to have continued in force ever since. Whether that court had authority to fix the clerk's fees for official services, instead of requiring him to charge in accordance with the Federal fee bill, may be doubtful, in view of the decision in *Pitts* v. *Logan County* (*supra*), that Congress is the only authority that

can fix the clerk's fees, but at all events it is certain that the circuit court for Massachusetts has put itself on record, since the decision in the *Hill* case, as regarding certain of the clerk's services in naturalization cases as strictly official services, the fees for which are "*to be accounted for in his emolument returns.*" In the present case, as stated above, *all* the services for which fees were received must, according to what appears in the record, be taken to have been clerical and regulated by the fee bill.

It is true that in the *Hill* case Blatchford, J., said that the fee bill "applies *prima facie* to taxable fees and costs in ordinary suits between party and party. There is no specification of naturalization matters in the fees of clerks." Apart from the fact that the *Hill* case appears to have been decided solely on the ground of the special equities of the appellees, and not because of any nonapplicability of the fee bill to services in naturalization proceedings, it is submitted, with all due respect to the memory of a learned judge, that the reason for suggesting a possible nonapplicability is not apparent. The naturalization of an alien is a strictly judicial proceeding. (*Spratt* v. *Spratt*, 4 Pet., 393, 406; *The Acorn*, 3 Abb. (U. S.), 434, 444; *McCarthy* v. *Marsh*, 5 N. Y., 263; *In re Clark*, 18 Barb., 444; *State* v. *Whittemore*, 50 N. H., 245; *Rump* v. *Commonwealth*, 30 Pa., 475.) In *Spratt* v. *Spratt*, Chief Justice Marshall said:

> The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law

> and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity.

In *Rump* v. *Commonwealth*, Lowrie, C. J., said:

> Naturalization is a judicial act. It is made so by positive law, and is essentially so in its nature, for it is a cause to be heard and decided on evidence, and involves a question of legal right.

What higher judicial character could have been ascribed to any "ordinary suit between party and party prosecuted in a court;" and can it be supposed that if *Spratt* v. *Spratt* had concerned clerk's fees, Chief Justice Marshall would have gone on to say: "But in spite of all this, fees for a clerk's services in such proceedings, though these services consist in doing things for which the fee bill expressly provides, are not to be included in 'all the fees and emoluments of his office, of every name and character?'"

It being manifest, then, that a district court clerk renders services (such as administering oaths, making records, affixing seals, etc.) in naturalization proceedings; that the services differ in no respect from similar services in ordinary litigation; that the services mentioned in the fee bill are not therein restricted to any particular class of proceedings, and that the proceedings themselves have as completely a judicial character as any that take place in the court, the conclusion must be that the fees received for such services are fees of the clerk's office, within the purport of the words "all the fees and emoluments of his office of every name and character," as used in section

833, Revised Statutes, and as such must be accounted for by the clerk. Could there be any doubt on the subject, public policy would require that the doubt be resolved in favor of the appellant, because it is well known that a license to any public officer to charge what fees he will, without limitation as to their amount or as to the amount that he may himself retain therefrom, and without his being accountable for them to anyone, is in itself a grave abuse, which Congress can not be presumed to have intended to perpetuate, especially after it had adopted, as it did long ago, a general system of limited compensation, with strict accountability for fees.

It is therefore submitted that the judgment of the court below should be reversed.

JOSHUA ERIC DODGE,
Assistant Attorney-General.
CHARLES C. BINNEY,
Assistant Attorney.

165-504

165-504

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 164.

UNITED STATES OF AMERICA, APPELLANT,

vs.

HENRY G. McMILLAN, JOHN J. DALY AND WORDEN P. NOBLE, APPELLEES.

RESPONDENTS' BRIEF.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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Star Printing Co., 143 S. West Temple St.

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, APPELLANT,

vs.

HENRY G. McMILLAN, JOHN J. DALY AND WORDEN P. NOBLE, APPELLEES.

RESPONDENTS' BRIEF.

As stated in appellant's brief, the only question arising upon this appeal, and which were passed upon in the court below in sustaining the demurrer to the complaint are: First—Whether the fees received by the respondent McMillan in the naturalization cases were fees and emoluments of his office as clerk; and, Second—Whether the fees received by him in cases wherein private parties were plaintiffs and defendants respectively, were to be accounted for by him to the United States.

We think both of these questions were properly answered in the negative by the lower court.

Fees received in naturalization cases are in no sense fees of the clerk, but are, as said by the United States Supreme Court in United States vs. Hill, 120 U. S. 169, paid the clerk by parties seeking naturalization as compensation for his services in looking over the papers and ascertaining their validity. The clerk acts as an aid to the court in passing on these cases and his duties in this respect are not connected in any manner with his duties as clerk. The court could appoint any person to act in these cases and the duties are

similar to those performed by a special master or referee and are totally unconnected with any services rendered as clerk. If such be the case, the clerk is not required to account for fees received in such cases. The case above cited is conclusive of this branch of this case.

SECOND.

The case of the United States vs. Averill cited by appellant is not in point here. In that case it does not appear that any of the fees or emoluments of office claimed to have been unaccounted for, were fees or emoluments in any cases or proceedings other than United States cases, and growing out of or arising under the United States Statute and Fee Bill The opinion of the court in this case is based upon the assumption that all the fees and emoluments of office unaccounted for, arose under the statute of the United States and the United States Fee Bill in cases wherein the United States were parties to the suits or proceedings. Such is not the case in the matter now before the court. In this case it is sought to have the clerk account for fees earned by him in cases wherein the United States is not a party and is in no way interested in the matters in controversy.

The principles upon which this case should be decided have very recently been passed upon by the Supreme Court of Utah. In the case of Marte vs. Ogden City Ry. Co., 35 Pac. Rep. 501, it was held that the Federal Fee Bill is not made applicable to officers and others doing or performing duties under Territorial laws, and that Sec. 823 of the Rev. Stat. U. S applies solely to the United States business and duties imposed by the laws of the United States, and is not applicable to cases in which the United States is not a party or of which the Federal courts would not have exclusive jurisdiction if the Territory were a State. The courts of

the Territory are not U. S. courts for all purposes, but only so far as the United States are a party to any action or proceeding, and the Territorial laws are applicable to and binding upon the court, so long as such laws are not inconsistent with the Federal Constitution and laws. The Territorial Legislature has the power to enact such laws with respect to the compensation of officers of the courts and having done so the general government cannot interfere and claim the benefit of such laws in the absence of direct statutory authority.

Clinton vs. Englebrecht, 13 Wall. 434.

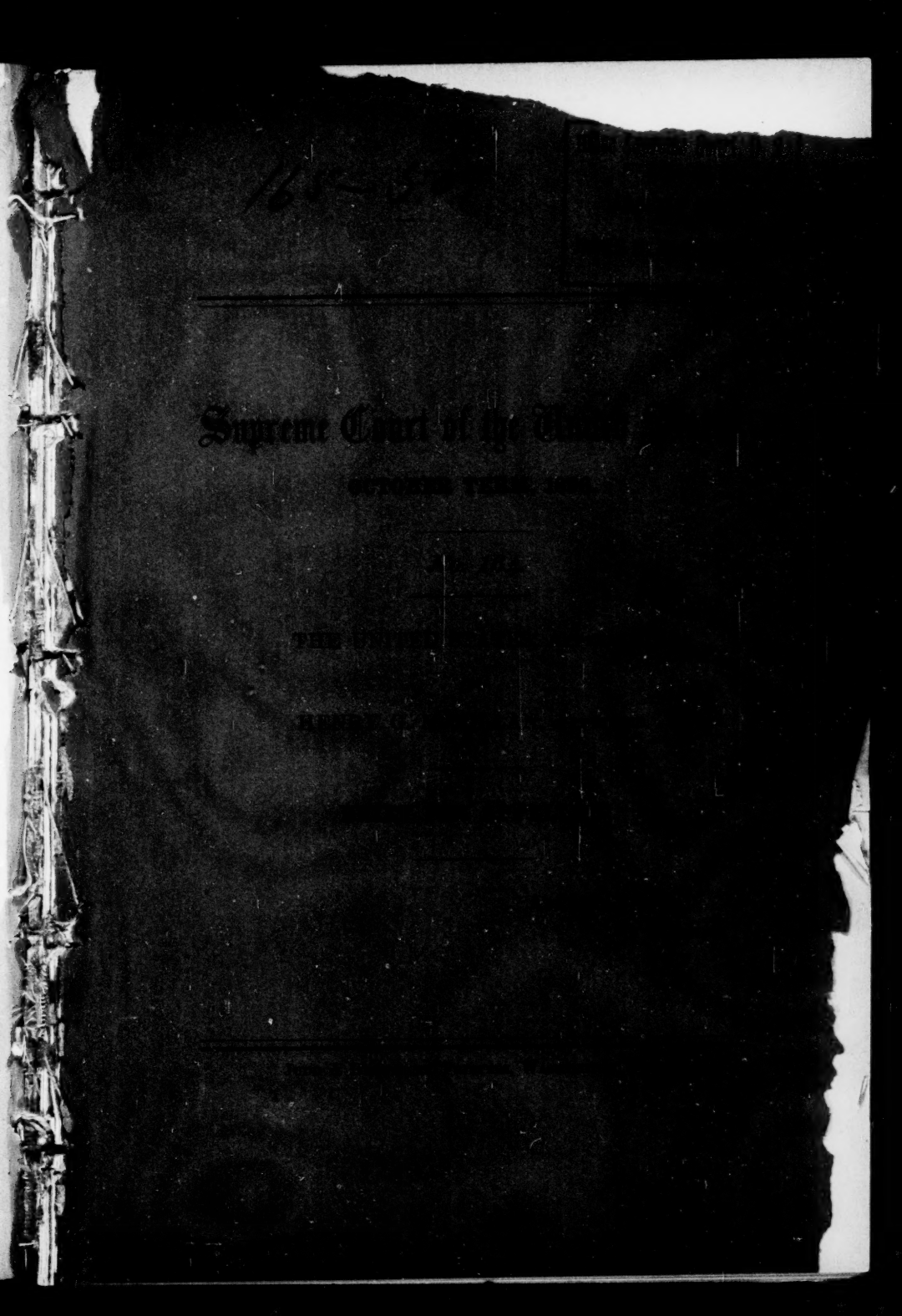
In all cases wherein private parties are interested in the United States can have no interest, is not injured by the proceeeings which may be taken and any fees collected by the clerk or other officer of the court under the Federal Fee Bill or Territorial Fee Bill are not part of the revenue of the Government and are not to be accounted for to the United States. To say that the United States is interested in these fees because by receiving them it would be benefited is begging the question. If the Government is not entitled to these fees, the mere fact that by receiving them it would be benefited and hence has an interest in the matter is no argument in favor of compelling the clerk to account for something to which the Government has no right.

Upon a comparison of the Federal Fee Bill and the Territorial Fee Bill, it will be seen that in the Territorial Fee Bill the clerk is permitted to charge for many items which do not appear in the Federal Fee Bill. Now if the Federal Statute, Section 823, is to govern and is the only statute by which fees in Territorial courts are to be regulated, then all charges and fees collected under the Territorial Statute are illegal and the clerk is liable for such

illegal charges. But it cannot be successfully claimed that he should account to the United States for such fees. The parties to the suits or proceedings are entitled to recover any such illegal fees paid by them and the United States has no interest whatever in the premises. The only persons who could possibly seek to compel the clerk to account for any illegal charges would be those who were entitled to have the illegal fees collected, refunded to them. The General Government has no right to seek a benefit to itself by taking into its possession something to which others are entitled. We think, however, that the two statutes are entirely separate and distinct and that Section 823 of the Revised Statutes is applicable solely to United States cases and has no reference to Territorial cases or cases wherein the United States is not a party.

We respectfully submit that the judgment of the lower court should be affirmed.

J. L. RAWLINS AND
ARTHUR BROWN,
Attorneys for Respondents.



165-534

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Supreme Court of the United States.

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No. 164.

THE UNITED STATES, APPELLANT,

vs.

HENRY G. McMILLAN, APPELLEE.

BRIEF FOR APPELLEE.

ARTHUR BROWN,
For Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 164.

THE UNITED STATES, APPELLANT,

vs.

HENRY G. McMILLAN, APPELLEE.

BRIEF FOR APPELLEE.

The appellee has heretofore filed a brief in this case, but it was prepared without having an opportunity to see the brief of the appellant, and a proper respect for the argument contained in that brief, since filed, perhaps demands a further answer.

This case depends largely, but not solely, upon the construction of section 1883 of the Revised Statutes of the United States as follows:

"The fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses, commissioners, and printers in the Territories of the United States, shall be the

same for similar services by such persons as prescribed in chapter sixteen, title 'The Judiciary,' and no other compensation shall be taxed or allowed."

And its application to section 839, which is as follows:

"No clerk of a district court, or clerk of a circuit court shall be allowed by the attorney general, except as provided in the next section, and in section 842 to retain of the fees and emoluments of his office, or in case both of said clerkships are held by the same person, of the fees and emoluments of the said offices respectively for his compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding $3,500 a year for any such District Clerk or any such circuit clerk, or exceeding that rate for any time less than a year."

In construing this section it is well to bear in mind as in *pari materia* the other statutes relating to Territories. They may shed more or less light upon the interpretation to be given to this particular one. Among those sections we call attention to the section delegating legislative powers to the Territories.

"SECTION 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

The Federal Government provided for the Territory of Utah four judges and paid to each a salary. Under the provision of legislative power the Territory also paid to the judges a salary.

Statutes of 1894, p. 154.

It was competent for the legislature of Utah to provide for payment of the officers of the Territory of any class or grade, whether they were already paid in part by the United States or not. The territorial courts were not United States courts. This is held not only in the Englebrect case (13 Wall.), but has been many times stated by this Court.

Being courts of the Territory, it was entirely competent for the legislature to make any provision with regard to them not inconsistent with that already made by the United States statutes. The section involved is further illustrated by fees of jurors and witnesses. What jurors' fees are to be regulated by section 1883? Clearly those who were sitting in United States cases. The United States paid the fees of jurors in United States cases only. All other fees of jurors are paid by the Territory. They were a local charge and it was entirely competent for the Territory of Utah to pay its jurors little or much. The connection between jurors and clerks in this section shows that the same interpretation is to apply to the one set of officers as to the other. The same language is used as to each; the same interpretation must apply to each.

It is also the subject of proper legislation for the Territory to provide what fees should be taxed as between party and party in private litigation. This is a matter which the Federal Congress remitted by its terms strictly and entirely to local legislation. It would have been competent to provide that no costs at all should be taxed; or that a particular sum in each case, without regard to any particular services done. There is nothing in any of the cases stated in appellant's brief which at all militates against this power being

delegated to the territorial legislature. It could also in like manner, we submit, have provided that the clerks of each court should have an additional salary to be paid by the Territory, which would not have been within the perview of this section, to be paid to the United States. Such a salary would not have been the property of the United States, and could not by the mere voting of it under any circumstances be made to be paid over. If they had seen fit to provide by local legislation that out of the territorial treasury of Utah Mr. McMillan should receive six thousand dollars, there is nothing, we submit, in this legislation of Congress to say that that six thousand dollars or twenty-five hundred dollars of it should be paid over to the United States Treasury. The United States has never signified the wish, if it had the power, to thus directly tax the Territories, and it would be nothing more than a tax in this matter. The whole subject of private fees is left entirely to the local legislation. The argument of the appellant proceeds upon the assumption that these courts are United States courts, and that the entire expenses of the clerk, the judges, and everything else were borne in fact by the United States. Nothing could be a greater mistake. It is true the United States paid some part of the expense of the courts, but the great bulk of the expenses was a territorial charge. The summoning and payment of witnesses in criminal cases, the payment of jurors, and in part the expense of running the court, the salaries of judges, were all territorial charges; so with the clerk's fees. Had the duties of the clerk of the third district court been simply those of attending to United States business, then the argument of appellant would have

some force; but, in addition to that, the clerk was attending not only to the criminal business of the United States, but the criminal business of the Territory—all local criminal business for which he had the right and did receive a salary from the Territory. The Compiled Laws provide, p. 806:

"Fees of district clerks in criminal cases, when the same cannot be collected from the defendant, shall be paid out of the territorial treasury on voucher properly certified to by the court and approved by the auditor of public accounts."

Illustrative of the power of the legislature of the Territory to use the clerk as the means of collecting income is the jury law of Utah; under the statute of the Territory, each party plaintiff in an action at law must pay to the clerk of the district court the sum of three dollars.

Session Laws of Utah, 1884, p. 25; Session Laws of Utah, 1890, p. 101; Session Laws of Utah, 1892, p. 85.

And this in turn the clerk must pay over to the territorial treasurer. If it is in the power of the department of the United States to compel the clerk to pay fees that are collected under territorial legislation, it would be equally in the power of the department to require that particular three dollars to be paid which is required for the express purpose of paying jurors. Does the act of Congress intend any such absurdity? That has never even been claimed by the department or the comptroller.

The clerk receives a percentage for collecting the three

dollars for the Territory, paid him by the Territory. Must he pay that also to the United States?

The business between private litigants, if paid for by fees, was a thing solely to be regulated by the legislature. The duties of the clerk of the third district court, in fact, were confined not to one court, but to several. He was the clerk of more than one court. Originally the Territory of Utah had three judges, one for each district. Ultimately four judges were appointed, and under the provisions of the law (1st Supplement, Revised Statutes, p. 49) any judge could ask the assistance of another judge of either of the other districts. Under that provision and for years before Utah was admitted as a State, and at the time these services were rendered, there were two courts constantly sitting in the city of Salt Lake. Both were Third District Courts. McMillan was the clerk of both during the years for which this suit was brought. One court would have been ample to attend to the United States business, but to dispose of the private litigation which was there required the services of two were necessary, and, in effect, this clerk had to do the double duty or hire it done.

The case depended upon, and, as I und erstand it, substantially the only case relied upon by appellant—United States *vs.* Averill, 130 U. S.—is entirely distinct from this and in no manner decides any of the questions involved here. The distinction will be found by comparing the two complaints with each other. In the Averill case the complaint alleged simply that Averill, the clerk, had received $5,253.33 in excess of the amount which he was entitled to retain for his personal services.

I quote the language of one of the counts and the language of all was identical:

"Between the 5th day of August, 1879, and December, 31, 1879, said Oscar J. Averill, while clerk as aforesaid, and as such earned, collected, and received from different sources as fees and emoluments of his said office $3,404.59, of which sum he was entitled to retain * * * as his personal compensation and necessary expenses; that it is and was the duty of the said Averill, clerk as aforesaid, to account for and pay over to the United States and into the Treasury thereof the surplus of all the fees and emoluments so earned and received by him over and above the amount last stated."

Supreme Court Records as bound together by clerk, October term, 1888, vol. 6, p. 5419.

There was no itemization or statement of what the fees were received for—whether for naturalization fees or for fees in private litigation or for United States cases. The demurrer admitted they were fees belonging to the United States. The defense and the contention for the defendant was solely that the section 1853 had no application at all, under any circumstances, to territorial courts, and the decision of the court is based solely upon the question whether the act of 1855, incorporated in that section, should apply to the Territory of Utah. Nothing beyond that seems to have been contemplated or decided.

U. S. *vs.* Averill, 4 Utah, 416.

What fees are to be included in the $3,500 allowed the clerk was not discussed and could not have been decided, because the complaint was not such as to permit its decision. The contention in this case is entirely different. We have

no quarrel with the decision made in the Averill case. We claim that it involved a different principle of law. The complaint in this case designates the particular kind of fees which it is claimed should be paid over. Quoting from the second count, the complaint is as follows:

"The defendant earned, collected, and received from different sources, as the fees and emoluments of his said office, $10,544.30, of which sum $1,793.35 was earned and received in United States business, $1,439.50 for declaration of intention and naturalization, and $7,311.85 from private persons in civil litigation."

The entire amount sought to be recovered under this complaint is $7,996.07, of which $6,215.50 was received for fees for naturalization, leaving a balance of $1,780.57 for fees collected in private litigation. If the Court should hold, as it held in the case of United States *vs.* Hill, that the defendant is entitled to retain the fees of naturalization, but is not entitled to retain the fees received in private litigation, then the extent of the amount in controversy is the last-named sum—$1,780.57.

There was no decision in the Averill case as to whether fees in private litigation should be included in the $3,500 or not. Naturalization fees were not alleged to be retained by Averill; therefore the court did not and could not decide that Averill did not have a right to naturalization fees.

The amount stated in this case shows conclusively that the defendant did not receive from United States business in excess of the $3,500, so there was nothing due on that score, and there is nothing stated to be due from him for such fees as are described in the Averill case.

As to this class of fees described in this complaint we have already discussed the liability for fees between private individuals. The fees that he received for naturalization seem to be entirely included and covered by the decision in the case of United States *vs.* Hill, 120 U. S., 169. Counsel for appellant in this case distinguishes that case because, he says, that it had been the custom in the Massachusetts court for the clerk to retain the naturalization fees. Well, it certainly has been the custom in the Utah court for the clerk to retain the naturalization fee. The law is precisely the same; according to the argument of appellant's brief, if it is true, the facts are the same. Counsel says in his brief, on page 16:

"As already stated, no such practice as prevailed in Massachusetts is shown to have prevailed in Utah, and hence no recognized interpretation of the statute in the appellee's favor appears to have existed in Utah when they executed the bond."

On the contrary, the whole argument of counsel himself shows that the Utah courts have constantly said that these naturalization fees should belong to the clerk, and in this very case the decision of the lower courts shows that they regarded these naturalization fees as having been taken with their consent and by the practice which had prevailed in Utah.

In fact, the learned counsel who drew the brief for the Government makes complaint all through it of the contemptuous conduct on the part of the authorities in Utah toward the United States, and quotes the Oklahoma case, I take it, not as authority for this Court to follow, but to show

what a good little Territory Oklahoma has been, while Utah has been bad and deserves the condemnation of the learned counsel and of the department in not paying over money as promptly as he imagines it should have done. Now, on this subject of contempt, and to show the circumstances of it, I quote and annex to this brief the opinions of Attorneys General and comptrollers of the department prior to the present official and mark them Appendixes A, B, C, and D.

It appears by reading these exhibits attached to our brief that not only was McMillan not guilty of contempt in this matter, but he was acting directly and consistently under the authority given to him by the department itself and by the opinion of the Attorney General as applied to this very case. They even went so far as to return money which he had sent to them at one time.

If we read the Hill case it will be seen that it is decisive against the Government of any claim for money received by McMillan for naturalizations.

I quote various passages from that case:

"In respect to naturalization cases, it has never been hitherto understood, either by the judges or the departments, that the fees of the clerk were for services rendered in his official capacity. At times, especially before elections, these applications are extremely numerous. The papers are usually prepared by the parties themselves or their friends, or more frequently by the agents of candidates. The hearings are *ex parte*, at no stated times, and it is rare that any person appears in opposition. It has, therefore, been necessary, both in the interest of the applicants and for the due and orderly execution of the law and to enable the court to dispose of the cases, that the papers should be looked over and corrected by

some person familiar with the law and practice, and in many instances that the witnesses should be examined before the cases were presented to the court for final action. It was for this service that the clerk has been allowed to make these charges to the parties. These are duties which the court has the undoubted right to have performed by some other person than the presiding judge. In these cases the clerk acts rather as a person appointed to assist the court in exercising its functions, like a master or examiner in an equity cause, or an assessor in admiralty, or an auditor in a suit at law. It is the universal practice of all courts of large jurisdiction to appoint special officers, at the expense of the parties, to make inquiries, investigate details, examine papers, take accounts, make computations, and perform ministerial acts. Their reports, when returned into court and accepted, become part of the case and form the basis of the orders and decrees of the court in the cause."

"Reference has been made to the circular of Attorney General Devens of January 14, 1879, issued to the clerks. In it he says, referring to section 833: 'This language embraces every possible fee or emolument accruing to you by reason of your official capacity, and does not allow the withholding of any. Whatever is done by you that you could not do if out of office has an official color and significance that brings it within the compass of the language of the statute.' This is undoubtedly a forcible and accurate statement of the meaning of the statute. BUT THE NATURALIZATION FEES DO NOT COME WITHIN THIS RULE. They did not accrue to the clerk by reason of his official capacity, and were for work which might as well have been done by him when out of office as when in."

"Viewing the whole subject in the light in which it appears on the face of the statute in regard to the fees of the clerk, we are met by the fact that section 823 of the Revised Statutes taken from section 1 of the act of February 26, 1893, chapter 80, 10 Stats., 161, provides that 'the following, and

no other, compensation shall be taxed and allowed to clerks of the district courts.' This applies *prima facie* to taxable fees and costs in ordinary suits between party and party prosecuted in a court. THERE IS NO SPECIFICATION OF NATURALIZATION MATTERS IN THE FEES OF CLERKS."

The Hill case was decided in 1886. The bond upon which this suit is brought was executed in 1889. The language used by the court in the Hill case is especially applicable:

"The surety in the present bond as well as his principal had a right to rely on that interpretation in giving the bond."

The idea seems very prevalent among the departments of the Government, and perhaps among other people, that the entire expenses of the territorial courts were paid by the United States. This is a great error. For many years the territorial legislature has made appropriations to defray fees and per diem of witnesses and jurors in territorial business, and for jurors in all territorial and civil business outside of cases in which jurors were employed in the transaction of United States business. This has been customary as to petit and grand jurors, both. (See appropriations of the legislature of Utah Territory for the years 1888–1890, and 1892.) The territorial legislature has also in these appropriations supplemented salaries paid to judges out of territorial funds. (See appropriations of the legislature of the Territory of Utah.)

It will be observed by an inspection of the territorial fee bill, which is the fee bill under which charges have been made in all business outside of United States business, that the fees for certain services therein are much greater than

those allowed in the United States fee bill, and that payments for such services are provided for in the territorial fee bill which are not contemplated in the United States fee bill.

In question of fees for naturalization the fees charged in this Territory for such services have been $5.00 for each person naturalized, which covered all the services in connection with the proceeding. This has been the custom throughout the Territory for many, many years, under the system which has prevailed in the conduct of courts in Utah Territory. It was not fixed by statute, neither was it in the nature of an illegal charge. For many years at Salt Lake City it has been necessary to keep two judges constantly employed on two benches of the court almost incessantly, term after term and year after year. This anomalous condition of affairs has multiplied the duties of the clerk twofold, and has made a condition of affairs not contemplated by any act of Congress with relation to such duties.

Under the practice act of the Territory the duties of a clerk were very much enlarged and the scope of his action very much extended, as compared with the practice in United States courts, and particularly in the duties imposed upon him in the selection of jurors and the preparation of lists, not only for his own court, but for the probate court in the county in which the district court is held; also in the issuing of process in both civil and criminal business, which involves considerable legal knowledge and application; also in the approval of bonds and the duty to sit and try and approve or reject the competency of sureties of certain classes of bonds in civil proceedings.

So far as I know or have been able to ascertain, no clerk or United States marshal in the Territories has ever accounted for or been required to account for fees earned in territorial cases.

It would seem that if any was to be made or required of a clerk in territorial courts of all fees made, both territorial business and United States business of every kind and nature, and especially where two courts have been in session constantly all the time, that at least the rule applicable to the United States circuit courts and district courts should be applied and a clerk allowed a compensation, as in the district courts and circuit courts of the United States—a maximum of $3,500 each, besides expenses.

ARTHUR BROWN,
For Appellee.

APPENDIX.

"A."

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
WASHINGTON, D. C., *May* 13, 1890.

HENRY G. MCMILLAN, Esq.,
Clerk U. S. Dist. Court,
Salt Lake City, Utah.

SIR: Under date of Feb. 7, 1890, the Department of Justice forwarded to this office your emolument return from July 1 to Dec. 31, 1889. Upon examining said return I find that you have charged yourself with $3,572.00, fees earned in naturalization cases. In view of the decision of the U. S. Supreme Court in the case of U. S. *vs.* Hill, to be found in vol. 120, page 169, Sup. Ct. Rep., you will please inform this office at your earliest convenience whether or not the above charges would properly come within the purview of said decision.

Please give full particulars relative to these naturalization fees returned by you, to enable this office to determine whether they fall within the decision of the Supreme Court in the Hill case, for in the event they do, the Secretary of the Treasury will be requested to return to you your deposit of $587.60, deposited as excess of maximum compensation for the calendar year 1889; these fees excluded, there being no excess.

Very respectfully,

J. R. GARRISON,
Acting Comptroller.

Clerk's office, third district court. H. G. McMillan, clerk.

SALT LAKE CITY, UTAH, *May* 19, 1890.

A. C. MATTHEWS, *Comptroller,*
Washington, D. C.

SIR: Replying to your favor of the 13th, referring to my charge against myself of $3,572.00 for naturalizations, etc., in my emolument return July 1 to Dec. 31, 1889, as clerk of the third district court, Utah, and my deposit of $587.60 with Treasurer of U. S.

The above amount of $3,572.00 were earnings from fees received by me for naturalizations, declarations of intention to become citizens, and making certified copies of naturalizations and declarations for persons who had been naturalized in most cases years ago. Almost all of the above fees were earned at an extra expense to me and were admissions by Judge Anderson, who sat at the same time as Judge Zane, in a different room, but as the same court, under a provision of our statute, and many at night sessions held to accommodate laboring men who worked all day, necessitating the services of an extra man at my own expense much of the time. There is no doubt in my mind about my case coming within the rule of U. S. *vs.* Hill, 120 Sup. Court Rep., p. 169.

The only remuneration received were those above mentioned, and as in above case the work, etc., preparation done entirely by clerk and his assistants, and absolutely no remuneration received from over 100 rejected applicants.

Very respectfully,

H. G. MCMILLAN, *Clerk.*

"B."

No. 1.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *May* 29, 1890.

Mr. H. G. MCMILLAN, *Clerk U. S. Court,*
Salt Lake City, Utah.

SIR: Herewith is enclosed original certificate of deposit No. 2619, issued by the Union National Bank of Salt Lake City, Utah, April 7, 1890, in your name, for $587.60, on account of fees collected from July 1 to December 31, 1889.

In compliance with the recommendation of the First Comptroller of the Treasury, dated the 28th instant, endorsed upon your letter of the 20th instant, instructions have this day been given for the return to you the sum of $587.60 upon your surrender to the bank of the full set of the above-described certificate of deposit. Please present the full set to the bank at once in order that the matter may be disposed of.

Respectfully yours, GEO. S. BOTDEELLY,
Acting Secretary.

"C."

No. 3.

6110—1887. L. N. W.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *June* 26, 1891.

Hon. T. W. FERRY,
Hotel Fredonia, H Street, City.

SIR: In compliance with the request made by you in the department this morning, herewith is returned the department letter of April 11, 1891, to Henry G. McMillan, clerk

of the Third Judicial District Court of Salt Lake City, Utah. The second sentence of said letter sets forth that it had come to the notice of the First Comptroller of the Treasury that Clerk McMillan had not included in his emolument return the fees earned by him in civil cases in said court. It is possible that a misunderstanding exists in the matter. The letter grew out of conversation in this department with a clerk from the office of the First Comptroller on this topic.

The practice of the department for many years has been to require the clerk of a territorial court to include in his emolument returns the services rendered in cases in which the United States was a party of record or of interest, including all fees earned in connection with naturalization cases of whatever character. The business done for the Territory, and for which the Territory pays him, is excluded from the emolument returns.

It has been heretofore held that the courts in a Territory under the organic act are actually territorial courts, transacting such United States business as may come before them. From this view of the matter the civil cases brought in such courts are brought in their character as territorial courts, and so the fees earned in such civil cases are not to be reported to the Department of Justice.

Very respectfully, WM. A. MAURY,
Acting Attorney General.

"D."

6110—1887. DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *December* 2, 1891.

THE FIRST COMPTROLLER.

SIR: On November 27, 1891, you referred to this office a letter addressed to you on October 10, 1891, by H. G. McMillan, clerk of the third district court of Utah Territory.

It relates to the fees earned by the clerk, which he is required to report in his semi-annual emolument return.

Section 1876 recognizes the district courts of a Territory as "territorial courts." It says:

"There shall be appointed a marshal for each Territory. He shall execute all process issued from the territorial courts when exercising their jurisdiction as circuit and district courts of the United States." This language clearly indicates that the courts are territorial, doing business for the United States whenever such business comes properly before them.

Section 1871, R. S., authorizes each judge of the supreme court of a Territory to "appoint one person as clerk of the district over which he presides, * * * and only such district clerk shall be entitled to a compensation from the United States."

The compensation to which a clerk is entitled from the United States is for services performed for the United States.

He is required by the Government to make semi-annual returns of his earnings in "the territorial courts when exercising their jurisdiction as circuit and district courts of the United States," and he may in this respect be like the clerk of the United States courts in the States.

The fees that he earns for his services in the territorial courts, and for which he receives compensation from the Territory, do not concern the United States.

The original emolument returns of the clerk were in compliance with law and no amended returns are needed. They were approved by the Attorney General and referred to the Treasury.

Very respectfully,

W. H. H. MILLER,
Attorney General.

165-578

200.

No. 576

Office Supreme Court, U. S.
FILED
JAN 9 1895
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES.

EX PARTE SMITH, MYERS & SCHNIER.

Notice of Motion.

To the Vulcan Iron Works and J. A. Wright and W. F. Booth, counsel, etc.

Take notice that on January 14, 1895, we shall move the above entitled Court at the court-room in Washington, D. C., on the opening of court on that day that the application of petitioners for a writ of *certiorari* may be heard and submitted on the copy of the record heretofore filed, and that the printing and filing of 25 copies of said record be dispensed with.

Said motion will be made on the affidavit of J. H. Miller, hereto annexed, and for the reasons therein stated.

Dated at San Francisco December 24, 1894.

J. H. MILLER,
M. M. ESTEE,
Counsel for Petitioners.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

J. H. Miller, being sworn, says that he is attorney and counsel for the petitioners in the above-named matter; that the printed copy of record filed in said matter on application for a writ of *certiorari* with the exception of one other used as an office copy is the only one in existence; that when the same was prepared affiant was under the impression that only one copy was necessary on the preliminary application for the writ, and hence he prepared only two copies, one for filing and one for his private use; that he is now informed that it will be necessary to have twenty-five printed copies filed, the cost of which he is informed will be $735 as based on the estimate of the clerk; that said preliminary application noticed for January 14, 1895, involves but a single question, viz., whether this is a

proper case for the issuance of the writ, and all the facts and documents necessary for determination of that question are set out in the printed petition for the writ, of which twenty-five copies have been filed in this Court; that in determining that question the transcript of the record, of which a single copy has been filed, would not be of any additional assistance to the Court over and above the petition itself, but said record will become material and be necessary for examination only in case the preliminary application for the writ is granted, after which affiant is perfectly willing to have twenty-five copies of the record printed.

That it would be a useless and unnecessary expense to have 25 copies of said record printed merely for the said preliminary hearing, and would be a great hardship on petitioners, and at the same time of no assistance to the Court.

Wherefore affiant prays this Honorable Court that the printing and filing of 25 copies of said record for said preliminary hearing be dispensed with, and that said hearing be allowed to be heard on the single copy of said record now on file and the 25 copies of the petition now on file.

J. H. MILLER.

Subscribed and sworn to before me this 24th day of December, 1894.

[SEAL.] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

Admission of Service.

Copy of foregoing notice and affidavit received this 24th day of December, 1894.

J. A. WRIGHT,
W. F. BOOTH,
Counsel for Vulcan Iron Works.

165-578

165-578.

Office Supreme Court, U. S.
FILED.
JAN 11 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 200.

THE VULCAN IRON WORKS

vs.

SMITH, MYERS AND SCHNIER.

On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

MOTION.

Comes now the Vulcan Iron Works by its counsel, Calderon Carlisle, and moves the court to permit the oral argument in this case of the question "whether, upon an appeal from an interlocutory decree granting a temporary injunction in a patent case, the Circuit Court of Appeals can render or direct a final decree on the merits," said oral argument to take place at the same time with the argument on the return to the rule to show cause issued in No. 639, and that the hearing of the above entitled cause as to any and all other questions shall be postponed until after the decision of the question aforesaid.

And in support of this motion counsel presents herewith a stipulation by which it is also agreed that this cause shall be dismissed in case of an affirmative decision of the question above stated.

CALDERON CARLISLE,
Counsel for the Vulcan Iron Works.

In the Supreme Court of the United States.
October Term, 1896.

THE VULCAN IRON WORKS
vs.
SMITH, MYERS AND SCHNIER. } No. 200.

On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

STIPULATION.

It is hereby stipulated and agreed by and between the parties in the above entitled cause, that, with the leave of the court, the hearing of this cause shall be postponed until after the decision of the question propounded by the court in the rule to show cause issued in the case of Edwin Norton and Oliver W. Norton *vs.* Milton A. Wheaton, No. 639.

It is further stipulated and agreed that, with the leave of the court, the question in this cause, that is to say—

> "whether upon an appeal from an interlocutory decree granting a temporary injunction in a patent case the Circuit Court of Appeals can render or direct a final decree on the merits"—

shall be argued orally at the same time with the argument on the rule to show cause in No. 639.

Finally, it is stipulated and agreed that if the decision of the court on the question above stated shall be in favor of the jurisdiction of the Circuit Court of Appeals this cause shall be dismissed by the appellees, Smith, Myers and Schnier.

CALDERON CARLISLE,
For the Vulcan Iron Works.

JOHN H. MILLER,
For Smith, Myers and Schnier.